LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 26 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 151

MOSS DAVID POSNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012

MARVIN M. KARPATKIN
JOHN E. LE MOULT
KARPATKIN, OHRENSTEIN & KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1550

MOSS DAVID POSNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES

This brief is addressed to certain of the statements and arguments contained in the memorandum for the United States submitted by the Solicitor General, in response to the petition for certiorari.[1]

The Government's contention that a *de facto* reopening did not occur in this case is based on a misreading of the record, and, we submit, a misunderstanding of the doctrine. Moreover, the Government's position underscores a conflict between the circuits which only this Court can resolve.

[1] Acknowledging the possible impact on this case of *Ehlert* v. *United States*, No. 1383, 1969 Term, No. 120, 1970 Term (see petition, pp. 15-19), the Solicitor General does not urge denial of the petition, but suggests that "the Court may wish to defer action on the instant petition pending its decision in *Ehlert*" (p. 7).

To begin with, the Government's memorandum misrepresents one of the most crucial facts in this case. In describing the "courtesy interview"[2] which petitioner had with his local draft board concerning his claim of conscientious objection, it states that "Petitioner devoted his entire appearance, lasting two hours and thirty-five minutes, to reading prepared statements" (p. 3). A reading of the board's summary shows, on the contrary, that members of the board took an active part in the hearing and questioned petitioner closely about the merits of his claim. See petition, pp. 29-31.

The Government's memorandum implies (page 6, fn. 5) that there can be no *de facto* reopening of a conscientious objector claim where the claim is made subsequent to issuance of an order to report for induction. No rationale is offered for this argument and it is not supported by any case law. On the other hand, this Court held in *Mulloy* v. *United States,* —— U.S. ——, 3 SSLR 3011, 3013 (June 15, 1970):

> "The board could not deprive the petitioner of the procedural protections attending reopening by making an *evaluative determination* of his claim while purportedly declining to reopen his classification." (Emphasis added.)[3]

---

[2] The Solicitor General uses the words "courtesy interview" and "appearance" synonymously (p. 3). But there is no explanation or even comment on the significance of the characterization by the *court below* of Dr. Posner's lengthy session with the local board as a "personal appearance." See petition, pp. 31-32.

[3] The Solicitor General argues that *Mulloy* is distinguishable on two grounds: first, that it presupposes a "timely tendered claim of C.O. status" (p. 6, fn. 5); and second, that it is evident that Dr. Posner's C.O. views arose prior to the induction order. *Ibid.* We contend that the Government is reading the unanimous decision

Unquestionably, the local board in this case made an "evaluative determination" of petitioner's claim while purportedly declining to reopen his classification. As the cases cited on pages 25-29 of the petition for certiorari demonstrate, such a *de facto* reopening can occur in claims for conscientious objection made after as well as before issuance of an induction order.

One recent circuit court decision directly in conflict with the Ninth Circuit on the doctrine of *de facto* reopening is *United States* v. *Noonan,* —— F.2d ——, 2 SSLR 3588 (3d Cir., April 6, 1970) which was not mentioned in the petition. There the registrant did not make his claim for conscientious objector classification until after he had received an order to report for induction *and had refused induction at the induction station.* The local board held a discretionary interview with the registrant and found 1) that there was no change in status, 2) that his claim did not have merit, and 3) that he did not meet the criteria for conscientious objection. It refused to reopen his classification. The Third Circuit reversed Noonan's conviction for induction refusal, holding that the action of the board constituted a *de facto* reopening. The Court said:

---

of this Court in *Mulloy* much too narrowly, and we respectfully suggest that the Government's uncertainty of the soundness of its view is reflected by its acknowledgment that this case may be governed by *Ehlert.* Insofar as concerns whether Dr. Posner's views arose pre- or post-induction order, the Government, in assuming the truth of a hotly-contested fact, is obfuscating the real issue. The question is not the *merits* of when Dr. Posner's views matured, but rather, whether the circumstances of his interrogation by the board indicate (1) that he was improperly denied reopening under the erroneous *Ehlert* rationale, and (2) that a *de facto* reopening occurred.

> "It is a blatant inconsistency to say that the board did not in fact reopen and 'consider anew' appellant's classification when it made specific findings as to his conscientious objector claim. This particular claim for exemption had never before been presented to the board. It was new information. The board cannot logically insist that it did not consider a new classification when it made findings that his 'claim did not have merit,' that he 'does not meet the criteria for C.O.,' and that there was 'no change in [his] status over which [he] had no control.' These conclusions were not divined by soothsayers from smoldering entrails. They were adduced from what the registrant told the board at the interview and from what he wrote on SSS Form 150." 2 SSLR 3589-3590.

The Court, in *Noonan,* said that it was bound to look at "the substance and not the form of the board's proceedings" and held that it would be a denial of procedural due process to permit a local board to prevent "administrative appeal from a refusal to reclassify by casting it in a form of a refusal to reopen." The board erred because "It affixed a label proclaiming it had not done that which, in fact, it did do." 2 SSLR at 3590.[4]

The summary of Dr. Posner's appearance before the board indicates clearly that the board did more than simply consider the date of maturation of his beliefs. It investigated his sincerity, his interest in noncombatant service and alternative service, and the religious basis for his beliefs.

---

[4] Circuit Judge Aldisert, writing for the Court, aptly quoted from Plautus' *Mostellaria,* Act III 2.105: *"Simul flare sorbereque haud facile est.* To blow and to swallow at the same time is not easy." 2 SSLR at 3590.

In its final determination, the board checked a box stating that:

> "It is the local board's opinion that the registrant is not a genuine conscientious objector and that his beliefs are no different now than they were prior to the issuance of his order to report for induction."

There is no way of determining from the mere check of this box whether the board based its decision solely on the date of maturation, or on the merits of the claim, or on both grounds.[5]

This method of checking the box next to the above quoted paragraph has been declared "defective" by the Second Circuit in *Paszel* v. *Laird,* —— F.2d ——, 2 SSLR 3591, 3594 (2d Cir., April 8, 1970). In *Paszel,* the Court pointed out that the box checked does not indicate that the individual was a conscientious objector both before and after receipt of the order to report for induction, but simply that his beliefs had not changed. It held that under the doctrine of *United States* v. *Gearey,* 368 F.2d 144 (2d Cir. 1966), to deny a post-induction order claim, it must be clear from the board's summary that it rationally found maturation prior to receipt of the induction order. Maturation thereafter would entitle the registrant to a reopening. In *Paszel* the

---

[5] Where an ambiguous local board record fails to clearly demonstrate whether the board based a denial of classification on a proper or an impoper reason, the board action is unlawful, and a remand should be directed. See *United States* v. *St. Clair,* 293 F. Supp. 337, 344 (E.D.N.Y. 1968); *United States* v. *Englander,* 271 F. Supp. 182 (S.D.N.Y. 1967); see also *United States* v. *Jakobson,* 325 F.2d 409, 416 (2d Cir. 1963), aff'd sub nom. *United States* v. *Seeger,* 380 U.S. 163 (1965); *United States* v. *James,* 417 F.2d 826, 832 (4th Cir. 1969).

Court remanded for a hearing to determine precisely what the board found. The court said:

> "Despite, or perhaps because of, the narrowness of the scope of review of actions of selective service boards, it is important for courts to know the ground upon which the board acted. We recognize that the Selective Service System is not subject to the Administrative Procedure Act with its requirement of reasons for the denial of an application, 5 U.S.C. §§551, 555(e), and that boards of volunteer laymen cannot be expected to express themselves with the elaboration of expert regulatory agencies. Still a serious claim like Paszel's deserved something better than an ambiguous checkmark." 2 SSLR 3594.

Dr. Posner deserved more than an ambiguous checkmark. Yet the Ninth Circuit appears to be in conflict with the Second Circuit on this very issue. The court below, apparently because of its holding in *Ehlert* v. *United States,* 422 F.2d 332 (9th Cir. 1970), cert. granted —— U.S. ——, Oct. Term 1970, No. 120, does not believe that local boards are required to follow any particular procedure in ruling on conscientious objector claims submitted after receipt of an order to report for induction.

The Ninth Circuit has recognized the concept of *de facto* reopening, *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967), but like the Solicitor General it does not believe the rule applies to conscientious objector claims submitted after receipt of an induction order. It therefore appears that there is a serious conflict between the Ninth and the Third Circuits, with the Second Circuit likely to follow the Third. Under the current ambiguity of the law a registrant from

a local board located in the Second Circuit has different defenses depending on whether he is prosecuted in New York (*Gearey*), New Jersey (*Noonan*) or California (*Posner*). Certiorari should be granted to settle this inter-circuit conflict on important questions of Selective Service law.[6]

September 23, 1970

Respectfully submitted,

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012

MARVIN M. KARPATKIN
JOHN E. LE MOULT
KARPATKIN, OHRENSTEIN & KARPATKIN
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner

---

[6] The Government also argues that this Court should not consider petitioner's contention that he was forced to waive his right to special findings under Rule 23(c) of the Federal Rules of Criminal Procedure. See petition, pp. 32-39. The only grounds urged by the Government are that this issue was not raised below. Yet this Court may, in unusual circumstances, consider questions not raised below. *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) and cases cited therein; see *Hormel* v. *Helvering*, 312 U.S. 552, 555-560 (1941). The forced waiver of special findings by the District Court for the Central District of California, is a highly unusual situation. It involves a blatant disregard for this Court's criminal rule-making power under 28 U.S.C. §2072. This Court should rule on this question in the exercise of its "supervisory power to formulate and apply proper standards for the enforcement of the criminal law in the federal courts . . ." *Marshall* v. *United States*, 360 U.S. 310, 313 (1959); see *McNabb* v. *United States*, 318 U.S. 332, 341 (1943).